IN THE

Supreme Court of the United States

October Term, 1976

No. 76-496

BENSON A. WOLMAN, *et al.*,

Appellants,

v.

MARTIN W. ESSEX, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio

BRIEF OF APPELLEES JAMES GRIT, et al.

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QUESTIONS PRESENTED

1. The State of Ohio permits the Ohio Department of Health or local public school districts to provide speech and hearing diagnostic services and psychological diagnostic services to nonpublic school pupils to the same extent that such services are supplied to public school pupils. These services, like medical-dental services, do not present any realistic potential for the inculcation of values, and there is no realistic fear that religiosity will intrude. Does

this program violate the Establishment Clause of the First Amendment?

2. The State of Ohio permits the Ohio Department of Health or local public school districts to provide therapeutic, remedial and guidance and counseling services to nonpublic school pupils to the same extent that such services are supplied to public school pupils. These services may be provided only at off-premise, neutral sites. Does this program violate the Establishment Clause of the First Amendment?

3. The State of Ohio authorizes local public school districts to loan to nonpublic school pupils such secular textbooks as are used by public school pupils in the public schools. It is stipulated that this program will be administered in the same manner as the textbook program in *Meek*. Does this textbook lending program violate the Establishment Clause of the First Amendment?

4. The State of Ohio has authorized local public school districts to lend to nonpublic school pupils auxiliary materials and equipment identical to those used in public schools. The lending program is administered by publicly-hired and controlled clerk-librarians. The materials have a fixed secular content and are incapable of diversion to religious use. Does this lending program violate the Establishment Clause of the First Amendment?

5. The State of Ohio permits local public school districts to furnish field trip transportation to nonpublic school children on the same basis as such transportation is provided to public school children. This includes transportation to governmental, industrial, cultural and scientific centers. Does this field trip transportation service violate the Establishment Clause of the First Amendment?

6. The State of Ohio permits local public school districts to furnish secular, standardized achievement tests and scoring services to nonpublic school pupils. The program does not include teacher-prepared tests or money grants. Does this standardized achievement test assistance violate the Establishment Clause of the First Amendment?

7. Once the State of Ohio has authorized a general welfare service to be supplied to all children, is it violative of the Free Exercise Clause of the First Amendment to deny such services to a child on the grounds that he remains a "sectarian citizen" even after he is released from the church-related school?

SUMMARY OF ARGUMENT

A. Introduction.

The State of Ohio has for the past ten years provided medical-dental, diagnostic, remedial and therapeutic services and secular materials and equipment to all children attending public and nonpublic schools in the state. This program has proven remarkably successful; has received broad-based community support and has alleviated handicaps which had forced children to cope with the learning process under stressful, physical and psychological burdens.

Although the constitutionality of this program had been upheld in the state and federal courts prior to 1975, the Establishment Clause concerns expressed in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), had to be accommodated. The Ohio General Assembly reacted in a responsible manner by adopting revised legislation which reflects an honest effort to satisfy the *Meek* criteria.

B. Salient Features of Revised Program.

1. On-Premises Diagnostic Services.

This branch of the Act authorizes diagnostic services to be provided at the nonpublic school. Diagnostic services,

like the medical-dental-optometric services, do not present any realistic potential for inculcation of values or for advancement of religion. The diagnostician, by definition, does not provide educational or instructional service.

The child at the diagnostic stage presents a series of symptoms which may be neurological, emotional, physical or medical in origin. He isn't ready for treatment; diagnosis must come first. In the diagnostic setting, the speech and hearing diagnostician or the psychological diagnostician uses a series of standardized and objective tests to procure and evaluate information and data. The question at this stage is simply whether there is a disability and, if so, what specialist should initially attempt to remove it.

In the *treatment* context, the roles are reversed. The person rendering the service is the giver and the student is the recipient. Hence the danger of inculcation of values. It is in response to this danger that treatment services are provided at off-premises, neutral sites.

2. Off-Premises Therapeutic, Remedial and Guidance Services.

Meek tells us that public employees who perform education services at church-related schools are likely to be influenced by the "religion-pervasive atmosphere" and succumb to sectarianism. The Ohio General Assembly responded to this concern by restricting therapeutic, remedial and guidance services to off-premises, neutral sites which would not be permeated by a religious atmosphere. This means that those services are now provided by public employees, under public control, at neutral facilities. Appellants argue that a nonpublic school child remains a "sectarian citizen" after he is released from the nonpublic school and will intimidate the publicly hired and controlled specialist into succumbing to sectarianism even at the neutral site. When appellants urge that nonpublic school

children must be denied secular, neutral and nonideological services at neutral facilities after they leave the nonpublic school premises, they are insisting upon a penalty for free exercise of religion.

3. Loans of Secular Textbooks.

The revised Act authorizes local public school districts to loan to nonpublic school pupils such secular textbooks as are used in the public schools. The parties stipulated the program will be administered identically to the Pennsylvania program before this Court in *Meek*. That decision and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), thus leave little doubt that Ohio's textbook loan program is constitutionally permissible.

4. Loans of Fixed-Content, Secular Materials and Equipment.

Auxiliary materials and equipment identical to those used in public schools are loaned to nonpublic school pupils or their parents by a publicly-employed and controlled clerk-librarian. All such materials and equipment have a fixed, secular content and are thus wholly incapable of diversion to religious use. Since those items are not loaned directly to church-related schools and have a fixed neutral content, the effect of the program is secular. The self-policing nature of the materials and equipment loaned under the Ohio Act negates the need for continued surveillance and thus avoids administrative entanglement problems.

5. Field Trip Transportation.

If, as *Everson* v. *Board of Education*, 330 U.S. 1 (1947) held, it is acceptable for a state to provide transportation of students to church-related schools where a religious atmosphere obtains, the provision of similar transportation to religiously neutral governmental, industrial, cultural and

scientific places cannot offend the Establishment Clause. The service provided to nonpublic pupils is identical to that provided to their public school counterparts in a context totally free from religious overtones.

6. Standardized Achievement Tests.

The purpose of these tests is to provide normative data descriptive of current achievement in the nation's schools. They permit broadscale comparison of educational achievement. Standardized tests by definition result in precisely the same test being administered to all who take it. By definition, these tests have nothing to do with religion since they are prepared to test achievement in the secular courses taught at the public schools. The broader the base the more reliable the results.

The revised Ohio Act has nothing to do with teacher-prepared tests and does not reimburse schools for costs of testing or grading. Thus, the Ohio program is clearly distinguishable from *Levitt* v. *Committee for Public Education,* 413 U.S. 472 (1973).

These standardized tests, like textbook and auxiliary materials and equipment loaned under the Act, have a fixed secular content. They cannot advance religion. They are not divertible to religious use.

7. The Ohio Auxiliary Assistance Program Will Not Promote Divisiveness Along Religious Lines.

Ohio can point to a ten-year history of a successful program that has been administered without divisiveness along religious lines. There is no reason to expect such divisiveness in the future.

The revised Ohio program extends secular, neutral and non-ideological benefits to all children in the state. The class of beneficiaries is defined by need rather than religious persuasion. The basic ingredient to presumed political divisiveness is "special benefit" and that is not present in this case. A legislative program that provides neutral assistance to all children rather than direct or indirect aid to churches isn't likely to engender political fragmentation along religious lines. Thus the lower court observed: "Since the services and materials provided under the statute may not exceed in cost or quality those provided to public school children, any political debate would, in the view of this Court, most likely relate to the need for and the merits of providing such services and materials to pupils in general rather than to those attending non-public school in particular." *Wolman* v. *Essex,* 417 F. Supp. 1113, 1125 (S.D. Ohio 1976).

ARGUMENT

I. A Ten-Year History of Auxiliary Assistance in Ohio.

A. Introduction.

Like any society, the State of Ohio has a clear right (if not a positive duty) to maximize the enlightenment and health of all its citizens by seeking to eradicate physical, emotional and neurological impediments to learning. Crowded prisons, hospitals and mental institutions and extended unemployment and welfare rolls bear grim witness to the need for all that can be done.

No segment of society can or should be ignored in this effort. It is with this goal firmly in mind (not an effort to sponsor, support or become actively involved with religion) that the Ohio General Assembly has sought to provide the same diagnostic, therapeutic and remedial services to nonpublic school children that it provides to their peers who attend public schools. This program has been in effect in the State of Ohio since 1967, has enabled many handicapped and underprivileged children to achieve according to their true potential and to respond meaningfully to the challenges that will confront them as adult citizens. *The recipients of this assistance are defined by their needs rather than by religious persuasions.* The program also permits public school administrators to select for nonpublic school pupil use educational materials which have a fixed content, which are incapable of diversion to religious use and which are being used by public school pupils.

No public funds flow to any nonpublic school, its students or their parents. The loan of all religiously neutral material is to the students and not to the schools. The health, remedial and therapeutic services are provided directly to the students by public employees with no intervention by nonpublic school officials. No services having any realistic potential for the inculcation of values (whether religious or other) are provided on nonpublic school grounds. The entire program was established and is being administered by local public school districts as part and parcel of the same chapter of the Ohio Revised Code which regulates state aid to public school pupils.[1]

B. Prior Constitutional History.

The constitutionality of Ohio's auxiliary service program was tested and upheld in the state and federal courts[2] prior to *Meek* v. *Pittenger*, 421 U.S. 349 (1975). But, the concerns expressed in *Meek* had to be accommodated; the program had to be revised.

The pre-*Meek* three-judge court decision upholding the constitutionality of this program was vacated and remanded by this Court for further consideration in light of the decision in *Meek*. But prior to such reconsideration, the Ohio General Assembly repealed the former law and adopted a substitute version. The revised legislation represents an honest and responsible effort to bring the law within the framework of the *Meek* criteria. It would be difficult for a state to do more to structure its response to an urgent need in a manner more obedient to the dictates of the Establishment Clause as interpreted by this Court.

Appellants seem to feel that their equitable posture is improved because the substitute legislation seeks to accomplish the same basic purposes with the same amounts of money. *Appellees see no need to respond in apologetic fashion.* There is no question but that the legislature remains dedicated to the removal of learning impediments.

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[1]Chapter 3317, Ohio Revised Code.

[2]*P.O.A.U.* v. *Essex*, 28 Ohio St. 2d 79 (1971); *Wolman* v. *Essex*, U.S. Dist. Ct., S. D. Ohio, E. D., No. 73-292, vacated and remanded, 421 U.S. 982 (1975) (hereinafter "Wolman II").

Indeed, this Court has repeatedly upheld such a goal as a valid legislative purpose.[3]

Because the legislation tested by the three-judge court had been repealed, the parties in *Wolman II* entered into a consent order declaring the repealed law violative of the Establishment Clause of the First Amendment of the United States Constitution but reserving decision on the constitutionality of its successor.[4]

C. Delayed Implementation of the Revised Act.

Appellants filed a facial challenge to this revised legislation immediately after its enactment. The lower court issued a temporary restraining order which remained in effect (with the later exception of textbooks) until the declaratory judgment was rendered on August 5, 1976. After upholding the constitutionality of the Act, the three-judge court refused to enjoin implementation during appeal. Appellants unsuccessfully applied to Justice Stewart, and then to Justice Marshall, for injunctive relief. The new legislation has been in effect in Ohio for approximately seven months, but its predecessor has been in effect since 1967.

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[3]*Meek* at 363.

[4]Pertinent portions of the consent entry recite:

"Counsel for defendants and intervening defendants have represented to this Court that they do not seek to urge distinguishing features between the Ohio legislation considered herein and the Pennsylvania legislation considered in *Meek* v. *Pittenger*, *supra*, and do not seek to urge the severability of various provisions in the Ohio legislation because the Ohio General Assembly has repealed that legislation and enacted new legislation (known as Senate Bill 170) providing non-public school pupil assistance.

• • •

"This order is not intended to address or adjudicate the constitutionality of Senate Bill 170."

[¶¶2 and 5 in November 17, 1975, Consent Order, *Wolman II*.]

II. Subversion of Legislative Intent Cannot Be Presumed in a Facial Challenge.

Appellants and appellees cooperated to bring this constitutional challenge before the federal courts without delay. All parties sought to have the law tested as soon as possible. Much effort was put forth in the development of an extensive stipulation of facts. Appellants quite properly in the court below addressed themselves to the facial terms of the Act and the stipulations. However, now that appellants are dissatisfied with the three-judge federal court result, they have conjured up a series of presumed potential abuses which are completely *dehors* the record.

Appellants have gone far beyond the record and realism in asking this Court to presume outlandish abuses. For example, they would have this Court assume that the local public school districts will, without statutory authorization, build special parochial school annexes or purchase church-related school parking lots so that new centers or mobile units can be established closer to the nonpublic school.

Subversion of legislative intent most definitely cannot be assumed to support a facial constitutional challenge:

> "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. There is nothing new in this argument. But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional."
>
> [*Tilton* v. *Richardson*, 403 U.S. 672, 679 (1971).]

In the most recent decision on this subject, Justice Blackmun commented on the practice of this Court with respect to facial challenges:

"It has not been the Court's practice, in considering facial challenges to stautes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds."

[*Roemer* v. *Maryland Public Works Board*, 49 L. Ed. 2d 179, 196 (1976).]

Appellants and *amici* have done an ingenious job of highlighting emotional appeal. The casual reader is bound to be impressed by such catchwords as "the dark and bloody background," "parochial satellites," "massive aid to churches," "interpreting heretical attitudes as psychological deviations," "free toothbrushes only to members of one religious sect," and "sectarian citizenship." But the use of such outrageous and misleading language only diverts attention from the true factual issues and constitutional principles that should govern this case.

This brief, therefore, shall be confined to the legal principles enunciated in the decisions of this Court and to the stipulations of this case rather than to the preposterous abuses and inflammatory language conjured up by appellants.

III. A Religious Mission in Church-Related Schools.

Although we take issue with appellants' attempt to describe the health, remedial and therapeutic services provided to nonpublic school pupils at neutral premises as potentially sectarian, *there will be no effort to deny the religious mission of church-related, nonpublic schools in Ohio*. Most parents and children selecting those schools do so with the expectation of a religious mission. *There has been no attempt in the past to change the mission in order to qualify pupils for state assistance, and there will be no such effort in the future*. This is why appellants correctly

assert that appellees do not seek to justify the constitutionality of this legislative program by denying the religious mission of the church-related schools. With this acknowledged, we must nevertheless point out that appellants have not fairly and accurately described the nature and extent of the religious mission in those schools.

This brief is submitted in behalf of parents of the Catholic, Lutheran, Christian and Jewish Day Schools. Appellants sought only to identify characteristics of the Catholic schools, and the stipulations at pages 30 through 33 of the appendix are limited accordingly. There is no evidence in the record of the religious aspects of the Lutheran, Christian, Seventh Day Adventist, Jewish, Baptist, Episcopal and Quaker schools identified at page 29 of the appendix.[5]

The stipulations with respect to Catholic schools [App. at 31-33] show that the teachers include members of almost all religious faiths and sects, that the secular courses are taught basically the same as they are taught in the public schools, that students who are not of the Catholic faith are not forced to attend religious classes or participate in religious exercises, that religion is not fused into secular courses, that no teacher is required to teach or integrate religious doctrine in secular courses, that almost 70% of the teachers are lay teachers and that most religious teachers have discontinued the wearing of religious garb.

These stipulations demonstrate that the Catholic schools in Ohio do not fit the standard profile described in prior decisions of this Court and that the heretofore presumed differences between elementary, secondary and higher education may need reconsideration. However, since church-

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[5]"The 720 nonpublic schools in Ohio include 657 Catholic, 29 private and nonsectarian, 32 Lutheran, 15 Christian, 15 Seventh Day Adventist, eight Jewish, four Baptist, one Episcopal, and one Quaker."

[App. at 28-29.]

related schools in Ohio have a religious mission and intend to retain it, we urge that the constitutionality of the Ohio program be upheld because it provides secular, neutral and nonideological assistance rather than because the schools do not fit a standard religious profile.

IV. Diagnostic and Health Services Are Not Instructional and Present No Likelihood of Advancement of Religion.

A. Differences Between Teacher and Diagnostician.

The new Ohio Act establishes two distinct categories of service to nonpublic school pupils. The first category includes medical-dental and diagnostic services which may be provided to the disadvantaged pupil on the premises of the nonpublic school. The second category includes remedial and therapeutic services which must be provided off-premises in a public facility and a neutral atmosphere. The different treatment between the two categories of service is premised upon functional differences between the nature of the service and upon guidelines suggested in prior decisions of this Court.

The on-premises services authorized in subsections D, E and F of the Act include:

> "(D) * * * *speech and hearing diagnostic services* * * *.
>
> (E) * * * *physician, nursing, dental and optometric services* * * *.
>
> (F) * * * *diagnostic psychological services* * * *."
>
> [R.C. § 3317.06 (emphasis added).]

The three-judge court below recognized the differences between a teacher and a diagnostician:

> "Diagnostic services differ markedly from teaching services in that the ongoing and at times unpredictable communication between the pupil and the teacher is not present in the diagnostic process directed toward the isolation of particular professionally recognized symptoms of physical or mental difficulties present in a child."
>
> [*Wolman* v. *Essex*, 417 F. Supp. 1113, 1121-22 (S. D. Ohio 1976).]

Diagnostic services do not present the potential for inculcation of values. In the diagnostic setting the diagnostician is receiving information and data. He is a recipient of facts; not an inculcator or a teacher. In the *treatment* context, however, the roles are reversed. The person rendering the services is typically the giver and the student the recipient. Hence, the danger of inculcation of values in the treatment setting and the need for off-premises rendition of such services.

Appellants at page 32 of their brief concede the facial constitutionality of the physician, nursing, dental and optometric services authorized by subsection E, but contest the constitutional validity of the on-premises speech and hearing and psychological diagnostic services.

Like the medical-dental services which are provided on-premises, diagnostic services are health related because the pupil at that stage simply evidences a defect or disability. It is unknown whether the cause is physical, mental, emotional or neurological. The pupil isn't ready for therapy or remedial service; diagnosis must come first. The diagnostician whether he be a physician, nurse, dentist, optometrist, speech and hearing diagnostician or psychological diagnostician, must use an interdisciplinary approach. Speech and hearing diagnosticians would indeed be ineffective if they couldn't recognize a problem that needed intervention by a

physician. Likewise, a nurse will hopefully recognize symptoms suggesting the need for psychological diagnosis. Since these services are all health related, there should be no fear that the doctor, nurse or diagnostician will succumb to sectarianism. *The diagnostician, by definition, does not provide educational or instructional service.* The question at this stage is simply whether there is a disability and, if so, what specialist should initially attempt to remove it.

B. On-Premise Diagnostic Services.

A child can more readily be sent to an off-premise neutral facility once a specific therapeutic or remedial program is indicated. However, it would indeed be cumbersome to send the child off-premises on multiple occasions for different forms of diagnostic testing if such can be provided on-premises absent any realistic potential for religious involvement.

The Ohio General Assembly in separating the situs of diagnostic services from treatment services was guided not only by the functional distinctions but also by footnote 21 to this Court's opinion in *Meek* which suggests that diagnostic services would not have been stricken had the severability doctrine been urged:

> "Act 194's authorization of 'speech and hearing services,' at least to the extent such services are diagnostic, seems to fall within that class of general welfare services for children that may be provided by the State regardless of the incidental benefit that accrues to church-related schools. See, e.g., *Everson* v. *Board of Education*, 330 U.S. 1, 91 L. Ed. 711, 67 S. Ct. 504, 168 ALR 1392. Although the Act contains a severability clause, Act 194, § 2, in view of the fact that speech and hearing services constitute a minor portion of the 'auxiliary services' authorized by Act 194, we cannot assume that the Pennsylvania General Assembly would have passed the law solely to provide such aid. See *Sloan* v. *Lemon*, 413 U.S., at 833-834, 37 L. Ed. 2d 939, 93 S. Ct. 2982. Indeed, none of the appellees has suggested that the severability clause be utilized to save any portion of Act 194 in the event this Court finds the major substance of the Act constitutionally invalid.
>
> [*Meek* at 372 n. 21.]

Unlike the situation in *Meek*, the severability of the various categories of assistance provided under the Ohio Act is conceded by counsel for appellants.

The stipulations entered into between the parties make it quite clear that the diagnostician *identifies* deficiencies which are thereafter treated off-premises.[6] It is also acknowledged that diagnostic tests are typically conducted individually in a separate portion of the school building.[7]

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[6]Stipulation No. 25. These services are to be provided in the nonpublic school and would include speech and hearing diagnosis, psychological diagnosis and physician, nursing, optometric and dental diagnosis. The purpose of these services will be towards determining if nonpublic pupils are deficient or in need of assistance in these areas. For example, the speech and hearing therapist would screen children to identify those with speech or hearing deficiencies. Treatment, if any, of the defect would take place off the nonpublic premises. Personnel (with the exception of physicians) employed to perform these services are employees of the local board of education. Physician service will be on a contract basis if that procedure is followed in the local public school district.

[App. at 37-38.]

[7]Stipulation No. 29. If sample health diagnostic specialists in each of these areas were called to testify, they would testify that the pupils requiring their services would typically be taken from the classroom individually and that the diagnosis would be provided in a separate room or area of the building.

[App. at 41-42.]

C. Standardized Diagnostic Procedures.

In an effort to abandon the stipulations at this late stage of the proceedings, appellants now describe the functions of the diagnostician as if he were engaged in therapeutic, instructional and educational service. At pages 36 and 37 of their brief, they inaccurately contend that the diagnostician will intrude into the social and behavioral aspects of the pupil's personality; use religious influence; tinker with the attitudes and personality of the pupil in the setting of a religious institution; evaluate the mental processes of children in a church; and interpret irreverent or heretical attitudes and beliefs as psychologically deviant or antisocial. These contentions simply ignore the fact that the role of the diagnostician is to test rather than treat — to ascertain facts rather than inculcate values.

The court below properly perceived the function of psychological diagnosis and accurately interpreted the stipulation of facts:

> "[Y]et this Court perceives a significant distinction between psychological diagnosis and psychological treatment. Psychological treatment would ideally involve an ongoing relationship with the particular child and would attempt to deal with the child in the context of his entire environment, including his educational environment, thus giving rise to the dangers articulated in *Meek*. Psychological diagnosis, on the other hand, requires only relatively limited contact with the child, and the procedures employed during such contact are more easily governed by objective and professional testing methods directed, not toward the ultimate rehabilitation of the child, but toward isolating professionally recognized symptoms."
>
> [*Wolman*, 417 F. Supp. at 1121.]

To be sure, a *treating* psychiatrist or psychologist could be presumed to have more communication with a student than would a physician or nurse. But at the *testing* level the psychologist is typically using standard diagnostic tests. Their role is to be aware of and administer the appropriate tests, to recognize the contributions and limitations of tests and to interpret the composite test results. The diagnostic tests used by the psychologist are divided into four categories.[8] There are intelligence tests, specialized tests oriented toward relatively specific areas of functioning, education achievement tests and projective tests. There are 58 accredited tests within these four categories. These are the tools of the psychological diagnostician.

Turning from psychological to speech and hearing diagnosis, appellants would have this Court ignore the interdisciplinary approach to speech and hearing diagnosis and the medical aspects of this particular discipline. Appellants fail to note that hearing and visual diagnostic tests are by statute specifically regulated by the Ohio Department of Health.[9] Audiometric evaluations, for example, consist of a two-phase testing procedure for hearing defects:

> "In general, the following two-phase testing procedure is utilized:

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[8]Ohio Department of Education, The Intern Program in School Psychology (1969).

[9]The pertinent portions of § 3313.69 of the Ohio Revised Code read:

"The board of education or board of health providing a system of medical and dental inspection of school children, as authorized by section 3313.68 of the Revised Code, shall include in such inspection tests to determine the existence of hearing and visual defects in school children. The methods of making such tests and the testing devices to be used shall be such as *are approved by the department of health*." (Emphasis added.)

I. A sweep test:
Generally, nurses or specifically trained volunteers conduct sweep tests, rather than school speech and hearing therapists. If a child fails to hear one or more tones in either ear at frequencies of 250, 500, 2,000, 4,000 and 8,000 Hz at a sound pressure level of 25 dB, (ISO, 1964), a threshold test should be given.

II. A threshold test:
Trained nurses and school speech and hearing therapists should conduct the threshold tests of hearing acuity of any child who fails a sweep test.

[Ohio Department of Education, Ohio School Speech and Hearing Services (1972), pp. 62-63.]

The symptoms confronting the diagnostician of speech handicaps are not tested by the "unrestricted and comprehensive religious conversations" suggested by appellants. The basic functions of the speech diagnostician are to:

"II. Provide diagnostic services for children with speech handicaps. These problems include:

A. Defects of articulation.

B. Stuttering.

C. Voice disorders.

D. Disorders of speech and voice associated with organic abnormalities such as hearing losses, cerebral dysfunctioning and cleft palate.

E. Speech disorders associated with delayed or disturbed language development.

F. Hard of hearing."

[Ohio Department of Education, Ohio School Speech and Hearing Services (1972), p. 31.]

The medical implications in diagnosis of speech problems quite obviously include a determination, for example, as to whether the teeth, tongue, lips and palate are capable of producing correct speech. What do appellants see in this that readily lends itself to the inculcation of religious values? One would be required to assume the grossest deviation from professional duties to find even the slightest chance of abuse.

Since the personnel assisting pupils pursuant to subsections D, E and F of the Ohio Act are isolating and diagnosing the cause of symptoms rather than providing educational or instructional service, they are akin to the physician, the nurse, the health inspector, the safety inspector, the minimum standard education inspector, the policeman, or fireman who enters the nonpublic school. If a police officer can enter a church-related school to protect a child from one form of harm, why can't a psychological diagnostician enter and protect him from a far more pernicious harm which, if uncorrected, could plague him the rest of his life?

V. Specialized Remedial and Therapeutic Service Will Be Provided At Neutral Facilities By Employees of The Ohio Department of Health or The Local Public School District.

A. Removal of Therapeutic and Remedial Services From Nonpublic School Premises.

Off-premise services authorized pursuant to subsections G, H and I of the Ohio Act include: therapeutic, psychological, speech and hearing, guidance and counseling and remedial services. The remedial reading teacher performs a combination of health, remedial and education services.

The speech and hearing therapist likewise provides therapy designed to eliminate health and educational impediments. The school psychologist is concerned with psychological barriers to the learning process. The guidance counselor is likewise providing a myriad of health, remedial and educational services. These are education related services which carry at least some potential for the inculcation of values. This explains the off-premises restriction in the new Act.

The assistance program before this Court in *Earley* v. *DiCenso*, 403 U.S. 602 (1971), called for a 15% annual salary supplement to teachers of secular subjects in nonpublic elementary schools. In declaring the statute unconstitutional under the Establishment Clause as fostering excessive entanglement between government and religion, Chief Justice Burger in the majority opinion stressed the fact that the teacher was under "religious control and discipline." 403 U.S. at 617.

The Rhode Island program failed to meet constitutional muster because of the potential for impermissible fostering of religion and because of the comprehensive, discriminating and continuing state surveillance required to insure adherence to First Amendment restrictions.

The drafters of the Pennsylvania legislation considered in *Meek* obviously felt that the potential for impermissible fostering of religion would not be present if the state provided auxiliary service personnel who were hired by and under the control of the local public school district. However, Justice Stewart, in speaking for the majority, found that this did not sufficiently eliminate the need for continuing surveillance:

> "To be sure, auxiliary service personnel, because they are not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. Cf. *Lemon* v. *Kurtzman*, 403 U.S., at 618, 29 L. Ed. 2d 745, 91 S. Ct. 2105. But they are performing important educational services *in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained.*"
>
> [421 U.S. at 372 (emphasis added).]

Justice Stewart also commented upon the situs where the services were performed at other portions of the opinion.

> "The 'auxiliary services' authorized by Act 194 — remedial and accelerated instruction, guidance counseling and testing, speech and hearing services — are provided directly to nonpublic school children with the appropriate special need. *But the services are provided only on the nonpublic school premises,* and only when 'requested by nonpublic school representatives.'"
>
> • • •
>
> "The appellants concede the validity of this secular legislative purpose. Nonetheless, they argue that Act 194 constitutes an impermissible establishment of religion because the auxiliary servives are provided *on the premises of predominantly church-related schools.*"
>
> [421 U.S. at 367-68 (emphasis added).]

When one considers the frequent stress in the *Meek* opinion upon the situs of service along with footnote 17, it seems apparent that this Court did not intend that auxiliary

services should be denied to children simply because they exercised their constitutional right to select a church-sponsored school:

> "The appellants do not challenge and we do not question, the authority of the Pennsylvania General Assembly to make free auxiliary services available to all students in the Commonwealth, including those who attend church-related schools. Contrary to the argument advanced in a separate opinion filed today, therefore, this case presents no question whether 'the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church-sponsored school.' "

[*Meek* at 368 n. 17.]

The framers of the revised Ohio Act interpreted *Meek* as permitting remedial services at neutral facilities.[10] If this is not what footnote 17 meant, then it is difficult to see how Chief Justice Burger's criticism can be avoided:

> "But this holding does more: it penalizes *children* — children who have the misfortune to have to cope with the learning process under extraordinarily heavy

[10]This was most definitely a safe assumption; this is the Ohio program; this is the one that is addressed in this brief. Appellants at page 42 n.28, gratuitously suggest that *Meek* may have invalidated Title I of the Federal Elementary and Secondary Education Act. We believe not, but leave that question for later consideration. A constitutional challenge to the federal program is pending in the Southern District of New York. [Pearl *Amici* Bf., p. 2.] The constitutional question with respect to Title I of ESEA should be explicitly reserved until a record describing its unique features is developed.

> physical and psychological burdens, for the most part congenital. This penalty strikes them not because of any act of theirs but because of their parent's choice of religious exercise.
>
> * * *
>
> "To hold, as the Court now does, that the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic, or other church-sponsored school does not simply tilt the Constitution against religion; it literally turns the Religion Clauses on their heads."

[421 U.S. at 386-87.]

B. Denial of Services Absent State Assistance.

During the 1960's, it became apparent that millions of children in this country needed the benefit of "auxiliary services" in order to participate meaningfully in state-accredited education and to become productive members of society. *The problem that existed then still exists today. These services are extremely expensive. Only the most affluent of parents can afford to employ private auxiliary service specialists.* Prior to the enactment of the predecessor of the current Ohio program, auxiliary services simply weren't available to nonpublic school children. Without such state assistance today, the disadvantaged nonpublic school child would be confronted with the melancholy consequence so vividly described by Chief Justice Burger in *Meek*:

"The melancholy consequence of what the Court does today is to force the parent to choose between the 'free exercise' of a religious belief by opting for a sectarian education for his child or to forego the opportunity for his child to learn to cope with—or overcome—serious congenital learning handicaps, through remedial assistance financed by his taxes. Affluent parents, by employing private teaching specialists, will be able to cope with this denial of equal protection, which is, for me, a gross violation of Fourteenth Amendment rights, but all others will be forced to make a choice between their judgment as to their children's spiritual needs and their temporal need for special remedial learning assistance."

[421 U.S. at 387.]

Perhaps the best way to determine the historical situation with respect to learning disabilities in the church-related schools in Ohio prior to the enactment of state auxiliary service legislation is to look at the record testimony in *P.O.A.U.* v. *Essex, supra*. One of the witnesses who testified in that case was a speech and hearing therapist, Clarion E. Johnston. Pertinent portions of her testimony were:

"Q. When you first started performing these [speech and hearing therapy] services for the parochial school pupils, what were your first endeavors?

"A. To screen the speech and hearing of all the parochial schools so we would have a list with which to begin. All the children in the odd grades were screened for hearing, and the even grades were screened for speech plus any referrals from teachers.

• • •

"Q. What percentage of the children that you have

tested for hearing defects fell below the acceptable hearing norms?

"A. About eight-and-a-half per cent of the children failed the initial screen.

"Q. That is, for hearing?

"A. For hearing.

• • •

"Q. What percentage of the pupils tested failed to pass the speech test when you first tested them?

"A. Twenty-six per cent.

• • •

"Q. Now, in the public schools I think you said something about on cross-examination—or, I mean, on direct examination, that you found around eight per cent hearing deficiency and about 26 per cent of speech deficiency, is that correct?

"A. That is in the parochial schools that I tested, these three.

"Q. Now, what about the public schools that you checked, what would the percentages be there?

"A. I think it would be much lower, since the service has been put in the public school for a longer time. We expected to turn up an awful lot of problems this year, which we really did *because they have never had this service.*"

[*P.O.A.U.* v. *Essex*, Record, at 378-84, 387 (emphasis added).]

The guidance counselor who testified in that trial also confirmed the fact that no such services were available in the church-related school prior to the initiation of the state program [with the exception of one part-time person under the federal program]:

"Q. How long have you been employed by the Columbus Public School System or of the Public School System?

"A. Sixteen years.

"Q. Is there any difference at all between the services you perform for the kids in the schools that you are now serving and the kids in the public schools?

"A. No, sir.

"Q. Did the schools that you are now located at have competent trained guidance personnel before you got there?

[Objections deleted.]

"A. No. Wehrle did not have; Corpus Christi I am certain did not have; St. Mary's had had one of our personnel workers from the Federal programs; and St. Leo did not have."

[*P.O.A.U.* v. *Essex*, Record, at 240-41.]

The State of Ohio has tried its best to restructure its auxiliary service program to satisfy this Court's criteria because it knows how important these services are to disabled and disadvantaged children. Chief Justice Burger is quite right. If this program is cancelled, these services will no longer be available.

C. Nonpublic School Children Should Not Be Denied Secular Services at Neutral Facilities After They Are Released From the Nonpublic School.

If, as appellees suggest, auxiliary service personnel will ignore their professional training and succumb to sectarianism even while in a public facility because they are providing therapeutic services to a Lutheran, Catholic or Jewish child, then why wouldn't that same person succumb to

sectarianism when providing a similar service to any Lutheran, Catholic or Jewish child enrolled in a public school?

For example, referring to a guidance counselor who is counseling a nonpublic school child *at a public center*, appellants urge "A guidance counselor or psychologist may well be intimidated in his approach to a teen-ager's sexual or familial difficulties by the fact that the counseling is in the environment of a group possessed of a clear, orthodox religious dogma on the subject." [Appellants' Brief at 48.] What is the factual basis for this statement? Do appellants seriously contend that constitutional issues of this magnitude should be decided by such unsupported and unsupportable suppositions? Relative to appellants' group environment theory, it must be remembered that therapeutic service is usually individual or small group service:

> "If sample therapeutic service personnel in each of these areas were called to testify, they would testify that the pupils needing their services would be serviced either individually or with a small group of students having similar problems and that the service would be provided in the public school, public center or a mobile unit."

[Stip. No. 34, App. at 43.]

How can appellants ask this Court to presume that a Lutheran child will intimidate a guidance counselor located in a public center to succumb to sectarianism if that child is on release time from a Lutheran school but that a Lutheran child will not have such intimidating influence on the counselor if he is released from a public school?

There is no professional, educational, legal or logical basis for a presumption that a publicly-hired and controlled guidance counselor will succumb to sectarianism when a child released from a nonpublic school enters a public facility to receive therapeutic assistance.

The doctrine announced by the United States Supreme Court in *Zorach* v. *Clauson*, 343 U.S. 306 (1952), tells us that children should not be disqualified from public benefits simply because they have been released from a church-related school. *If there is no constitutional infirmity in releasing a child from a public school classroom to receive off-premises religious training*, then *there certainly can be no constitutional infirmity in releasing a nonpublic school child from a nonpublic school classroom to receive a secular service.*

Justice Douglas who wrote the majority opinion in *Zorach* described the program considered by the Court in the first paragraph of his opinion:

> "New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instructions."
>
> [343 U.S. at 308.]

In distinguishing the *Zorach* program from the one considered in *McCollum* v. *Board of Education*, 333 U.S. 203 (1948), Justice Douglas concluded:

> "We follow the McCollum Case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion."
>
> [343 U.S. at 315.]

The contacts between church and state were substantial in the *McCollum* case and minimal in *Zorach*. Although appellants assert that the change in situs, like other changes in the Ohio program, is nothing more than a sham, the fact is that the situs of instruction in *McCollum* and *Zorach* did indeed have meaningful First Amendment significance. The situs of remedial and therapeutic service in our case has even greater significance because of the new entanglement test first announced by the United States Supreme Court in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). The situs of the therapeutic and remedial service is equally significant because of the presumption that the atmosphere of a church-related, nonpublic school is religion-pervasive; whereas the public school, public center or mobile unit parked on public premises is not.

D. Free Exercise Implications of Branding a Child as a Sectarian Citizen After He Is Released From the Church-Related School.

Appellants are not content to place a sectarian label on pupils while they are in attendance at church-related schools. They insist that a child attending such school be branded a "sectarian citizen" wherever he goes. To be sure, they are willing to concede that he can go to the zoo and public recreation parks *like nonsectarian citizens*, but the sectarian badge must stand as a barrier when he seeks to receive secular, neutral and nonideological services even in public facilities.

Appellants' approach is typified by the statement at page 48 of their brief that "Moreover, even though the services may be provided at a nonsectarian site, under S.B. 170,

they will be provided to an *identifiable sectarian group.*" Why must appellants label these children as sectarian after they leave the church-related school? Are these children identifiable sectarian children when they go to the movies; when they enter the grocery store; when they participate in dances with other children; or when they go to the library?

In an effort to support the proposition that a child attending a church-related school remains a member of a "distinct sectarian class" even after he leaves the premises of that school, appellants argue at page 47 of their brief that the furnishing of free toothbrushes only to Christians or only to Jews would be inconsistent with the Establishment Clause. We agree! But, we aren't here dealing with legislation which provides a benefit to members of one religious persuasion not available to others. It must be remembered that the services involved in this litigation are available to nonpublic school pupils only to the same extent that they are available to public school pupils.[11]

The Free Exercise Clause of the First Amendment will be little more than a meaningless phrase if children are to be classified as "part of a sectarian group" after they leave the premises of the church-related school. When appellants urge that children must be denied therapeutic and remedial services by public employees under control of the local public school district at public facilities because they are registered at church-related schools, *they are insisting upon a penalty for free exercise of religion.*

If appellants would follow a Lutheran child who attends a Lutheran school away from the school until he reaches a

[11]"No school district shall provide health or remedial services to nonpublic school pupils as authorized by this section unless such services are available to pupils attending the public schools within the district."

[R.C. § 3317.06.]

public library and insist that he be denied neutral services provided in that library because he is a member of a sectarian group, how much further would they follow him? It's one thing to urge that there is a religious atmosphere in a church-related school which prevents certain services from being provided on-premises. It's quite another to insist that this atmosphere follow the child like an omnipresent cloud when he is released from the nonpublic school.

We do not urge that the State of Ohio is under an obligation to provide auxiliary services to nonpublic school children. But it has decided in its own interest as well as that of the child to do so. The practical effect of adopting appellants' view would be to condition the availability of such services upon a parent's willingness to withdraw his child from a church-related school. That effect would clearly penalize the free exercise of constitutional liberties.

For more than a quarter of a century the Supreme Court has made it clear that a government may not deny a benefit, even a gratuitous one, to a person or class of persons on a basis that infringes his constitutionally protected interest – especially First Amendment interests. *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Speiser* v. *Randall*, 357 U.S. 513 (1958). "For if the government could deny a benefit to a person because of his constitutionally protected [First Amendment rights], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which [it] could not command directly.'" *Perry* v. *Sinderman*, 408 U.S. 593, 597 (1972). Thus, the Court in *Sherbert* concluded:

> "This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other

faith, *because of their faith, or lack of it*, from receiving the benefits of public-welfare legislation.' "

[374 U.S. at 410.]

E. Therapeutic and Remedial Services at Neutral Sites.

At page 43 of their brief, appellants argue that the only difference between the Ohio law and the Pennsylvania law stricken in *Meek* is the "technical difference of title to the classroom." This isn't true. This Court was concerned with atmosphere in *Meek*. The services were stricken because they were performed "in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained." 421 U.S. at 371. The Ohio program calls for the services to be provided in a *different atmosphere*. The importance of the change effected by the new Ohio Act is to remove all religiosity from the atmosphere where the service is provided.

Once the Ohio General Assembly decided that the therapeutic and remedial services would be provided at some facility other than the church-related school, options were somewhat limited. The Act permits such services to be performed in "the public school, in public centers or in mobile units located off the nonpublic premises ° ° °." R.C. § 3317.06 (G). The stipulation reveals that the selection of the appropriate facility in a given instance depends upon distance, safety and adequacy of accommodations.[12]

In urban areas, many of the public and nonpublic schools are located in close vicinity to each other. In such instances

[12]Stipulation No. 32. The determination as to whether these programs would be offered in the public school, public center, or mobile unit will depend on the distance between the public and nonpublic school, the safety factors involved in travel, and the adequacy of accommodations in public schools and public centers.

the public school serves as the ideal facility for providing remedial and therapeutic services if there is space available. If the public school and nonpublic school are in close proximity but space is not available, the public school-ground area serves as an ideal location for a mobile unit. Appellants, of course, delight in labeling this as "curbside services" and in describing the mobile units and public centers as parochial school annexes or "satellites." Such "word games" are no substitute for scholarly constitutional analysis.

If we are dealing with a rural, nonpublic school that does not have a public school or public center nearby, the mobile unit is an ideal facility. The mobility of the unit enables it to reach children at remote schools and to serve pupils at many different schools. These mobile units are, of course, self-contained and equipped with the therapeutic or remedial equipment needed by the therapist. *They are owned and and operated by public school districts whose officials establish their location and operational procedures.*

At page 49 of their brief, appellants argue "clairvoyance is not required to foresee that public centers, like mobile units, will generally be located as close to the parochial schools as possible." This is obviously accurate. If the local public school district seeks to arrange services to be provided at a public center, it quite naturally is going to look to the closest one possible. *After all, the whole purpose of the program is to help children and to remove impediments and disabilities.* It would be absurd to argue that the local public school district would try to find the most distant public center possible and transport the child great distances in order to satisfy appellants' interpretation of Establishment Clause restrictions.

Appellants stress the fact that although public school districts use mobile units for public school pupils, the mo-

bile unit stationed close to the nonpublic school will, except in unusual circumstances, be servicing only nonpublic school pupils. It would be unrealistic to suggest that anything other than this would be the case. Unless the public and nonpublic school are quite close to each other, a mobile unit servicing public and nonpublic school children is going to serve public school pupils when it's stationed close to the public school and nonpublic school pupils when it's stationed close to the nonpublic school. The crucial point is that "these units will not be parked on nonpublic premises."[13]

Although appellants will undoubtedly continue to refer to the mobile unit as a parochial satellite, the fact is that the utilization, availability and efficiency of such units preceeded the Act presently before this Court. Mobile library units, mobile driver training units and mobile therapy units have been in existence for quite some time. They are particularly adept for servicing small numbers of pupils at multiple school locations. Their utilization has also proven particularly appropriate where capital expenditures are not justified because of temporary shifts in enrollment.

After dismissing the mobile units as parochial school satellites, appellants argue that the public centers are also constitutionally infirm because they provide a special benefit to the "sectarian pupils" who will be receiving the therapeutic service at the public center. In other words,

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[13]Stipulation No. 31. These services would include therapeutic speech and hearing, therapeutic psychological, remedial, guidance and counseling, and services for children who are deaf, blind, emotionally disturbed, crippled, or physically handicapped. Each of these services can only be provided in the public school, in public centers or in mobile units located off the nonpublic premises. Personnel performing these services would be employees of the local board of education or under contract with the State Department of Health.

[App. at 42.]

the argument is to the effect that if a child who is enrolled in a Lutheran school, for example, leaves that school and receives a therapeutic service at the local public library, he is receiving a "special benefit" geared to a sectarian class.

Skipping for the moment the question of whether the Lutheran child is a "sectarian" when he is in a public library, we must ask appellants how that child is receiving a special benefit if he receives speech and hearing therapy at that public facility. By definition, he will only receive this service if the same service is provided to all public school children within the district having a similar need. What's the purpose of the service? The purpose is to remove the hearing deficiency. Are appellants suggesting that a child whose hearing definicency is removed while he is in a separate room in a public library is receiving a greater benefit than the public school child whose hearing deficiency is removed while he is treated by a therapist in the public school building. There is nothing sectarian about the service and there is no special benefit. This is, of course, why appellants stretch the free "toothbrush" argument to show a special benefit but in doing so hypothesize a benefit that's made available only to members of one religious faith and to no one else.

Appellants also ask the Court to assume that the local public school district will utilize state-appropriated funds to build new public centers for the purpose of providing benefits to "sectarian pupils." This is utterly absurd. The Act authorizes no such capital expenditures. All capital construction funds for our Ohio schools are raised by tax levies at the local level and indeed the State of Ohio provides no capital construction funds to any local school districts.

Appellants couple their "build new buildings" argument with the equally unsupportable assertion that the services

may be provided on parking areas presently owned by churches but transferred to the local public school district. This kind of abuse is not authorized by the statute and there's nothing in the stipulation of facts to suggest it would occur. The parties stipulated that "these units will not be parked on nonpublic premises."[14]

Appellants have challenged this legislation facially and entered into a factual stipulation. Even so, great portions of their brief are devoted to supposed facts not contained in the stipulation and to assumptions of outlandish abuse which haven't occurred and which aren't going to occur. *If trial counsel challenging the constitutionality of a state statute were permitted to have the Court assume the worst conceivable administrative abuses, it would indeed be a rare state statute that could withstand constitutional challenge.*

VI. The Ohio Textbook Program Is Being Administered Identically to the Pennsylvania Textbook Program Upheld in *Meek*.

Although appellants' departures from the record have been noted in various sections of this brief, the most serious departure appears at page 53 of their brief. Appellants state that there are "significant distinctions" between the Ohio and Pennsylvania textbook programs. They then assert that the Ohio textbook loan program may be used to furnish items not approved in *Meek* or *Allen*. This assertion not only calls for an assumption of unconstitutional application; *it is in direct contradiction to the stipulation of facts.*

[14]Stipulation No. 33. If a program is to be offered at a public center such as a library, public meeting hall, firehouse, or recreation center, services may be available for public and nonpublic pupils at the same center. Although some local school districts in Ohio provide services to public school pupils in mobile units, when services are provided to nonpublic pupils in such units they will in all probability be stationed on public property close to the nonpublic school of attendance. These units will not be parked on nonpublic premises.

[App. at 42-43.]

Stipulations 17 through 20 describe the Ohio textbook program. The parties stipulated that the textbooks would be loaned to the pupils or their parents; that the loaning of the textbooks would be based upon individual requests; that the textbooks will be limited to the same secular textbooks as are used by public school pupils in the public schools; that common suppliers would be used to supply books to both public and nonpublic school pupils; and that the textbooks loaned under the Act would be limited the same as those under the Pennsylvania program.[15]

Stipulation No. 20 should be compared with the definition of textbooks in the Pennsylvania Act which appears in the third footnote to Justice Stewart's opinion in *Meek*. Stipultion No. 20 and that definition are identical. Counsel for the parties intended it to be identical. Thus, we frankly

[15]"17. Division A of 3317.06 of the Ohio Revised Code provides for the loaning of textbooks to pupils attending nonpublic schools or to their parents. The books that may be loaned are limited to those which are acceptable for use in public schools in the state.

"18. The loaning of textbooks will be based upon individual requests submitted by nonpublic pupils or their parents. These requests will be summarized by the nonpuplic school and forwarded to the appropriate public school official.

"19. The secular textbooks used in nonpublic schools will be the same as the textbooks used in the public schools of the state. Common suppliers will be used to supply books to both public and nonpublic school pupils.

"20. Textbooks, including book substitutes, provided under this Act shall be limited to books, reusable workbooks, or manuals, whether bound or in looseleaf form, intended for use as a principal source of study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group."

[App. at 35-36.]

find it hard to believe that counsel would now ask this Court to find that the program will be implemented contrary to this stipulation.

The parties explained the stipulation to the Court below at the time they presented a consent entry which permitted monies to flow for the purchase of textbooks during the pendency of the litigation.[16]

Judge Kinneary, who authored the unanimous opinion below specifically found:

> "On its face, this aspect of the statute is constitutionally indistinguishable from the textbook provisions upheld in *Board of Education* v. *Allen*, 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060 (1968) and in *Meek* v. *Pittenger*, *supra*, 421 U.S. 349, 95 S. Ct. 1753, 44 L. Ed. 2d 217. This Court is therefore of the opinion that that portion of § 3317.06 O.R.C. providing textbooks or textbook substitutes to nonpublic pupils or to their parents does not contravene the First or Fourteenth Amendments."
>
> [*Wolman*, 417 F. Supp. at 1117.]

Justice Stewart while explaining why the Pennsylvania textbook lending program in *Meek* did not offend the constitutional prohibition against laws respecting an establishment of religion, noted the lack of any evidence that the textbooks would be used for religious purposes:

> "Moreover, the record in the case before us, like the record in Allen, see e.g., 392 U.S. at 244-245, 248, 20 L. Ed. 2d 1060, 88 S. Ct. 1923, contains no suggestion that religious textbooks will be lent or that the books

[16]Docket Entry No. 18, dated February 13, 1976, is the consent order modifying the temporary restraining order and permitting expenditure of funds for the textbook lending program.

> provided will be used for anything other than purely secular purposes."
>
> [421 U.S. at 361-62.]

Justice Blackmun in *Roemer* again reminded us that parties challenging the constitutionality of textbook lending programs have been unable to show that secular textbooks would be put to other than secular purposes: "Since it had not been shown in *Allen* that the secular textbooks would be put to other than secular purposes, the Court concluded that, as in *Everson*, the State was merely 'extending the benefits of state law to all citizens.' " 49 L. Ed. 2d at 187-88.

Appellants have not only failed to show the Court that the secular textbooks lent to children in Ohio would be put to other than secular purposes, they have stipulated to the contrary.

Justice White's words are as true today as they were in 1968:

> "The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."
>
> [*Board of Education* v. *Allen*, 392 U.S. 236, 243-44 (1968).]

VII. The Auxiliary Materials and Equipment Are Loaned Directly to Pupils, Are Used by the Pupils and Are Incapable of Diversion to Religious Use.

A. Changes to Accommodate Concerns Expressed in *Meek*.

The pre-*Meek* Ohio program called for the lending of auxiliary equipment and materials *directly to the nonpublic schools*. The post-*Meek* program calls for the lending of a more limited category of auxiliary equipment and materials directly to pupils and parents and authorizes the employment of public school clerical personnel who will administer the lending program without constitutionally objectionable entanglement. The duties of these new lending personnel are described in Stipulation No. 22.[17]

[17]"22. This Act authorizes the employment of clerical personnel by local public school districts to administer the process of loaning instructional materials and equipment to pupils or their parents. The duties of these clerical personnel will include the following:

a. Distribution of loan request forms

b. Receipt and cataloging of loan requests

c. Maintaining an inventory of instructional materials and equipment

d. Distribution of instructional material and instructional equipment to eligible nonpublic pupils or their parents

e. Collection of instructional material and instructional equipment

f. Maintaining custody and storage of materials and equipment

g. Performs all other duties necessary for the efficient implementation of the materials and equipment program."

[App. at 36-37.]

Stipulation No. 24 also demonstrates that only auxiliary equipment and materials readily identifiable as secular will be available for loan to nonpublic school pupils.[18]

The post-*Meek* program contains a specific legislative proviso that the materials and equipment may not be divertible to religious use and further limits materials and equipment to items which may be loaned to individual pupils or their parents. These differences are indeed constitutionally significant; they are differences in substance as well as form. These differences make the new Ohio program readily distinguishable from the program rejected in *Meek*.

The lending of either textbooks or secular educational materials to the pupil rather than to the church-related school is an important difference because of the religious character of the school. Justice Blackmun commented upon this difference in his opinion in *Roemer:*

> "The first [*Meek* program] was the loan of instructional materials and equipment. Like the textbooks, these were secular and non-ideological in nature. *Unlike the textbooks, however, they were loaned directly to the schools*. The schools, similar to those in Lemon I, were ones in which the 'teaching process is, to a large extent, devoted to the inculcation of religious values and belief.' Id., at 366, 44 L. Ed. 2d 217, 95 S. Ct. 1753. Aid flowing *directly to such 'reli-*

[18]"24. Most public schools will purchase all equipment and materials including those to be loaned to nonpublic pupils or their parents from common suppliers. Large systems will use the bidding process and include all items on the list regardless of whether or not they are to be used by the public or nonpublic pupil. The same personnel will make purchases for both public and nonpublic pupils and can readily assure that they are secular since they are purchased as public school items."

[App. at 37.]

gion-pervasive institutions," ibid., had the primary effect of advancing religion."

[49 L. Ed. 2d at 192 (emphasis added).]

As a result of the post-*Meek* revisions, the Ohio material and equipment program is indistinguishable from the textbook program approved in *Meek*.

The significance of the identity of the recipient is highlighted by the fact that the *first sentence* in Justice Stewart's opinion in *Meek*, which distinguishes textbooks from the instructional material and equipment, stresses:

"Although textbooks are lent *only to students*, Act 195 authorizes the loan of instructional material and equipment *directly to qualifying nonpublic elementary and secondary schools* in the Commonwealth."

[421 U.S. at 362-63 (emphasis added).]

Justice Stewart in *Meek* explains that it is because of the predominantly religious character of the schools that *direct loans* of secular materials to them have a primary effect of advancing religion:

"But we agree with the appellants that the *direct loan* of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act."

[421 U.S. at 363 (emphasis added).]

The primary effect of the Ohio plan is not the advancement of religion because self-policing materials having a fixed content not divertible to religious use are lent directly to pupils and their parents and because the new Ohio Act

very carefully spells out "a lending library procedure" for dissemination of these materials to pupils. The new Act authorizes publicly-employed and controlled clerical personnel to administer the lending process. Even if self-policing materials required surveillance, the contact would be with a public employee.

The lending of auxiliary materials and equipment to nonpublic schools was rejected in *Meek* because of the religious atmosphere in those schools. *Yet the secular books were being used by pupils in precisely the same schools.* Since both the textbook and auxiliary material and equipment are self-policing and clearly identifiable as secular, there must indeed be another reason for the different treatment in *Meek*. The difference is indeed the identity of the recipient and the reduced or eliminated likelihood of excessive entanglement in implementation of the loan to the pupil and parent.

Appellants would undermine the significance of the direct loan to the pupils by suggesting that the materials and equipment really aren't used by the pupils like a textbook and that the loan concept is a sham. This misconception is understandable because of the changes that have occurred in the educational process.

B. Individual Use of New Multisensory Aids.

The ability of counsel to speak intelligently about educational assistance at the elementary and secondary level is inevitably impaired by the literal explosion in new educational concepts and techniques that has occurred during the past decade. Children today are exposed to a *multisensory educational approach* that will prepare them for the computer age that lies ahead. If appellants start out with a stereotyped vision of a classroom with a teacher, 30 students and a blackboard, they simply won't be able to

comprehend the extent to which schoolchildren are able to utilize auxiliary material and equipment lent to them under the Ohio program. We simply didn't have reading pacers, arithmetic machines, tachistoscopes, shadow scope readers, rotomatics, plastic hand viewers, teaching tapes, micro projectors and similar individual-use equipment when we were in school.

Educators of the 1960's and '70's have come to realize that the solitary lecture or textbook cannot reach out far enough to take advantage of the new horizons of knowledge. Appellants' contention that the educational equipment and materials loaned to students under the Ohio program are not really in the custody of and used individually by the children simply demonstrates a lack of awareness and appreciation of what takes place in the modern classroom.

Students are exposed to materials and equipment designed for individual use at the earliest educational levels. This equipment and material, of course, supplements the lecture by the teacher. The Montessori child, for example, will individually work with sound discrimination sets. These include multicolored cylinders which make their own individual sounds and aid the child in determining auditory discrimination. These same children may also individually use color coded cylinders to sharpen visual perception and improve concentration and muscle coordination.

Such early experiences prepare them for later individual use of pegboards, hand-eye manipulation units, fill-n-spill counters and similar materials designed to improve visual and tactile perception. Appreciation of math concepts are enhanced by the use of dominoes, geometric figures, numerods, flash cards, counting frames and a great variety of mini computers. The child is later able to work with self-instructional modalities, which include cassette tapes for

auditory, visual and kinesthetic approaches to reading skills.

When appellants suggest that maps aren't susceptible to individual use, this simply indicates that they haven't observed the great variety of map-cassette combinations which permit a student to follow cassette lessons with eight and a half by eleven maps that are colored or filled out by the pupil. The child isn't simply looking at a wall map; he creates his own map in compliance with the cassette lesson. To be sure, some of the materials may be used by more than one child, but if it has a fixed neutral content, what's the difference? It is indeed ironic that appellants repeatedly exalt substance over form yet suggest that the test for the lending of secular materials should be geared to factors unrelated to the evils against which the Establishment Clause protects.

C. The Aids Have a Fixed and Neutral Content.

Justice Stewart, in delivering the opinion of the Court in *Meek*, properly described these materials and equipment as "self-policing, in that starting as secular, nonideological and neutral, they will not change in use." 421 U.S. at 365. This is the only kind of material and equipment that is contemplated and loaned under the Ohio program. Appellants refer frequently to overhead projectors, but these may not be supplied under the Ohio Act because they *are divertible* to religious use.

By way of example, rudimentary computers are now available for all phases of math instruction. The more basic computers might, for instance, simply have a series of cubes in a container. The face of the cube will designate a problem. After the child answers it himself, he then pushes the cube. It rotates and reveals the correct answer on the reverse side. These are simply referred to as teaching machines.

For drill purposes, the children can check out push-button computers that are pre-programmed for lessons at various grade levels. The child first pushes a lesson button and a problem is flashed on a small screen. He pushes the appropriate buttons to answer the problem. If he gives a correct answer, the machine indicates this with a smiling face. If he gives an incorrect answer, there's a frown and the problem is reflashed until the child gets the right answer. This simply adds a dimension of venture to what other wise might be a boring school day.

Children can now receive tutorial service without a live tutor. Individual tutorgrams which can be used for a variety of subjects are available for this purpose.

Individual study is also facilitated by study-scope programs which include a great variety of subject areas. The child is given a pre-programmed cylinder containing a tube and paper program. The child simply turns the scope so that one window reveals a question and another window indicates the answer. These kinds of materials, equipment and programs are loaned directly to a pupil. They are suited only for individual use. Teachers today recognize that children achieve at different rates during different phases of their educational development. One, two or three children may need individual attention from the teacher while the others are directed to individual-use equipment and materials to supplement the earlier lecture.

With the benefit of self-instructional materials and equipment now available, today's student has the opportunity to experiment, explore and calculate his way to an exciting educational experience.

The individual use of state-provided auxiliary materials and equipment by pupils had been established as early as 1969 when the *P.O.A.U.* v. *Essex* case was tried in Ohio. The record in that case shows that even when the materials

were technically loaned to the school rather than the pupils, they were auxiliary in nature and used individually by the pupils. As page 273 of that record, Ms. Fulton, a fourth-grade teacher at St. Paul's School, explained the benefits of the audio-visual assistance program:

> "Q. Are the pupils, to your knowledge, at St. Paul's School, where you teach, benefitting from audio-visual assistance provided by the State legislation recently enacted in Ohio?
>
> "A. I think I can speak well for this, as I am also the audio-visual aids director at our school besides teaching the Fourth Grade. I have never in my teaching experience, although I realize it is limited experience, experienced the great—what word do I want to use—wealth of learning that all these materials has brought, and I have seen children that I did not believe would ever be able to accomplish much in school go out into our learning center where all of our materials are in plain view, go out and use these materials, work on an individual basis, and most all the children in our school know how to use every one of the machines that we have, and they are available for their use all day long."

D. Aids Unavailable Before State Assistance.

The record in that case also establishes that these auxiliary audio-visual materials were not available prior to the enactment of the state legislation except in the rare circumstance when they were purchased by parent groups. Reverend Applegate testified to this effect at page 312 of the *P.O.A.U.* v. *Essex* record:

> "Q. ° ° ° Now, if the State did not provide this money for you through the school districts and you pro-

vided the same service as the public schools provided, where would this money come from?

"A. We wouldn't be able to; you mean the services and the materials, the hardware and the soft ware we are receiving through 350?

"Q. Yes, sir.

"A. We wouldn't be able to do it."

E. Situs of Storage Not Significant.

At page 29 of their brief, appellants argue that there can be no loan to the pupil because materials and equipment are authorized to be stored on the nonpublic premises. Appellants apparently have failed to note that textbooks lent to students were stored on nonpublic school premises under both the Pennsylvania and New York textbook programs approved by this Court.[19]

F. No Need for Administrative Entanglement Between Church and State.

We are here concerned with the constitutionality of a program which loans secular, neutral and nonideological self-policing materials and equipment to pupils for individual use. This is what is described in the stipulations. This is what is now being implemented. The effect of this program is secular because the materials and equipment have a fixed secular content. There is no need to police their continued use since they are not divertible to religious

[19]"Under both the Pennsylvania and New York textbook programs the nonpublic schools are permitted to store on their premises the textbooks being lent to the students. Compare Department of Education, Commonwealth of Pennsylvania, Guidelines for the Administration of Acts 194 and 195, § 4.6, with Board of Education v. Allen, supra, at 244 n 6, 20 L Ed 2d 1060, 88 S Ct 1923."

[*Meek* at 361 n.9.]

purposes. Their secular nature, like that of textbooks, can be determined without entanglement with religious authorities. If someone wanted to make sure that the public school districts were supplying secular textbooks to the nonpublic schools, he could simply review *public school* purchase and supply lists. The same would be true with equipment and material supplied under the Ohio program; he could check with the public school purchasing agent or the public school lending librarian. If the public school authority has indeed provided nondivertible equipment and materials (and it is stipulated that this is what is being lent) there is no need for continued surveillance.

VIII. Transportation of a Nonpublic School Child to a Science Center Will Not Advance Religion.

The constitutional justification for school bus transportation to field trip events is essentially the same as that for transportation to and from school. *Everson* v. *Board of Education*, 330 U.S. 1 (1947). The New Jersey statute in *Everson* was declared constitutional even though "children are helped to get to church schools" and "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pocket." 330 U.S. at 17. Stipulation 38 tells us that the new Ohio Act will permit transportation for field trips only if such transportation is provided to public school students and that the field trips will consist of visits to governmental, industrial, cultural and scientific centers.[20]

[20]"38. Division L permits local public school districts to provide such field trip transportation services as are provided to public school students. Field trips would consist of visits to governmental, industrial, cultural, and scientific centers designed to enrich the secular studies of students."

[App. at 49.]

Appellants argue that these field trips enrich the secular studies of a student and bear a direct relation to the educational program. Having said this appellants must concede that bus transportation for field trip events is much less subject to attack than standard school bus transportation. Transportation to the field trip event takes a pupil to an enrichment experience. Transportation to school takes the pupil directly to the full educational experience. *Surely, if it is constitutional to transport a child to a church-related school, it is constitutional to transport that child to a scientific center, a governmental building, an industrial structure or a cultural center.* These are precisely the same sites visited by public school pupils in public buses.

Justice Black in *Everson* commented that: "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U.S. at 18. The same is true of the field trip transportation under the Ohio program. This legislation does no more than provide a general program of transporting public and nonpublic school pupils to governmental, industrial, cultural and scientific centers.

If appellants argue that children may not be transported in public buses to scientific centers and governmental buildings because they attend state accredited, church-related schools, they are confronted with the remonstrance in *Everson* that:

> "On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, non-believers, Presbyterians or the members of

> any other faith, *because of their faith or lack of it*, from receiving the benefits of public welfare legislation."
>
> [330 U.S. at 16.]

Appellants also assert without record support that field trip transportation of nonpublic school children will lead to excessive entanglement between church and state. School bus transportation of public and nonpublic school pupils has been administered in Ohio without entangling difficulties or religious pressures upon public school busing authorities for better than ten years. Appellants argue that there will be greater scheduling difficulties with respect to field trip transportation than standard transportation. This is based upon a lack of understanding of school transportation. The school buses and their drivers are extremely busy in the mornings prior to the beginning of the school day and in the evenings when the school day is completed. Intermittent transportation to field trip events during the school day creates no scheduling problems and results in more efficient utilization of capital expenditures. The excessive "entanglement" involves nothing more than a phone call to the local school district transportation coordinator.

IX. Standardized Achievement Tests Are Incapable of Diversion to Religious Use.

The new Ohio Act has nothing to do with teacher-prepared tests. It does not reimburse schools for costs incurred in testing. No money flows to the nonpublic school or parent. It simply permits the local public school districts to send the standardized achievement test to the nonpublic schools and to arrange for the grading of those tests by the commercial publishing organizations which prepare and grade standardized achievement tests.

The purpose of these tests is to provide normative data descriptive of current achievement in the nation's schools.

"We hold that the lump sum payments under Chapter 138 violate the Establishmen Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specific services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial function."

[413 U.S. at 482.]

The standardized achievement test starts out secular and ends up secular regardless of whether it's administered in a public or nonpublic school. The three-judge court below stressed this readily identifiable secular feature:

"Unlike the testing program invalidated in *Levitt*, the program authorized by the Ohio statute does not involve tests prepared by nonpublic school teachers, and therefore cannot result in the danger of inadvertent religious indoctrination. Rather, the Ohio statute authorizes the provision of only those same tests and scoring services as are provided in the public schools of the local district. The content of such tests, then, is necessarily and without further precaution restricted to the secular content of the state-required secular courses taught in the nonpublic schools. Since nonpublic school personnel are involved in neither the substantive drafting of the tests nor in the scoring of those tests, there is no possibility of inadvertent injection of religious doctrine in the administration of the tests. Likewise, because nonpublic school personnel will be involved only ministerially in the administration of the tests, the program will not foster an excessive entangling relationship between the state and the church-related school."

[*Wolman*, 417 F. Supp. at 1124.]

These standardized tests, like textbooks and educational materials, have a fixed secular content. They cannot advance religion. Their constitutionality should be sustained.

They permit broadscale comparison of educational achievement. Standardized tests by definition result in precisely the same test being administered to all who take it. By definition, these tests have nothing to do with religion since they are prepared to test achievement in the secular courses taught at the public schools. The broader the base the more reliable the results.

The stipulations confirm that the tests are standardized, that they are the same tests and scoring services as are in use in the public schools and that they apply only to secular subject.[21]

Levitt v. *Committee for Public Education*, 413 U.S. 472 (1973), is instructive but involves an entirely different legislative program. In *Levitt*, the state reimbursed the church-related schools for the cost of record keeping and testing. The reimbursement included the cost of traditional teacher-prepared tests drafted by nonpublic school teachers. Chief Justice Burger, in delivering the opinion of the Court, observed:

"We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religions institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church."

[413 U.S. at 480.]

The concluding paragraph in Chief Justice Burger's opinion confirms the distinction between the Ohio and New York programs:

[21]Stipulation 37. Division J permits the local public school district to supply to pupils attending nonpublic schools such standardized tests and scoring services as are in use in the public schools of the state. Such tests are used to measure the progress of students in secular subjects.

[App. at 48.]

X. The Ohio Auxiliary Service Program Does Not Benefit a Special Class and Will Not Promote Divisiveness Along Religious Lines.

The revised Ohio auxiliary service program extends a series of secular and neutral benefits to all children in the state. The class of beneficiaries is defined by need rather than religious persuasion. The basic ingredient to presumed political divisiveness is "special benefit" and that is not present in this case. Chief Justice Burger commented upon this "special benefit" ingredient in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971):

> "But in Walz we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations *that benefit relatively few religious groups*. Political fragmentation and divisiveness on religious lines are thus likely to be intensified."
>
> [403 U.S. at 623 (emphasis added).]

The lower court also commented upon the lack of special benefit while explaining why politically divisive fragmentation along religious lines was not likely to occur under the Ohio program:

> "Finally, although the programs authorized by the statute are dependent upon periodic appropriations, it is the conclusion of this Court that the potentially divisive political effect of the programs is minimal. The statute on its face provides services and materials to students attending nonpublic schools only to the extent that those services and materials are already available to children attending public schools. Additionally, the services and materials provided to students in nonpublic schools cannot exceed in cost or quality the services provided to students attending public schools. Therefore, this statute merely extends already existing programs to all students in Ohio. Since the services and materials provided under the statute may not exceed in cost or quality those provided to public schoolchildren, any political debate would, in the view of this Court, most likely relate to the need for and the merits of providing such services and materials to pupils in general rather than to those attending nonpublic schools in particular."
>
> [*Wolman*, 417 F. Supp. at 1125.]

Appellants' proclaimed fears of potential political divisiveness are not well founded. There is no need to speculate. Although Ohio cannot cite this Court to "a page of history" alluded to in *Walz* v. *Tax Commission*, 397 U.S. 664, 675-76 (1970), it can point to a ten-year history of a remarkably successful auxiliary service program which has strong community support and which has been implemented without evidence of political divisiveness along religious lines. The three-judge court below was familiar with the local scene and in the best position to determine whether a presumption of future divisiveness would be appropriate.

This legislation provides benefits to children in the true sense of the word. None of the benefits is capable of diversion to religious use; none can flow by conduit to alternate recipients; not one penny is channeled directly or indirectly to nonpublic schools. It starts with the child, it benefits the child, it ends with the child. General legislation which provides neutral assistance to all children rather than direct or indirect aid to churches isn't likely to engender political fragmentation along religious lines.

To be sure, the $44 million per annum appropriation which supports the omnibus legislation is large. Unfortunately, however, it is equally true that the great bulk of the

appropriation finances health-related services, both diagnostic and remedial, and such services are among the most expensive in our society today. But whatever the cost, the services under the Act are administered by the Ohio Department of Health and by specialists hired by local public school districts, and in no event may such services exceed the cost or quality of the services provided to public school students.

Since most of these services are provided on an individual basis, the cost would be prohibitive for most public or nonpublic school parents, but such cost is an excellent investment for the State of Ohio. If by removing barriers to meaningful and productive citizenship the state is able to keep only a small percentage of those served off unemployment and welfare rolls and out of penal institutions, the money has been well spent.

CONCLUSION

The revised Ohio auxiliary service Act represents Ohio's responsible and honest effort to satisfy the dictates of *Meek* v. *Pittenger* and its continued commitment towards the eradiction of learning impediments which burden disabled, deprived and disadvantaged children in the state's public and nonpublic schools.

The revised Ohio Act is confined to secular objectives, and neither advances nor impedes religious activity.

The revised Ohio Act does not impair the objectives of the Establishment Clause. It does not result in sponsorship, financial support or active involvement of the sovereign in religious activity. The unanimous decision of the three-judge court below should be affirmed.

Respectfully submitted,

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